

IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 517 OF 2011

BETWEEN:

LLOYD ENRIQUEZ

Claimant

AND

BELIZE TOURISM BOARD

Defendant

BEFORE: Hon. Chief Justice Kenneth Benjamin.

June 3, 2014.

Appearances: Mr. Fred Lumor, SC for the Claimant.
Ms. Natoya Boyd for the Defendant.

JUDGMENT

[1] The Claimant, Lloyd Enriquez, was employed by the Belize Tourism Board from August 2003 until March 1, 2011 when his employment was terminated. He was paid for one month in lieu of notice, severance pay for three weeks for each of eight years' service, accrued vacation leave and pension contributions. By a Claim Form and Statement of Claim filed on August 11, 2011, the Claimant brought suit for damages for wrongful dismissal, interest and costs.

[2] Upon the matter coming on for pre-trial review, the Defendant admitted liability for wrongful dismissal. Accordingly, the proceedings are solely concerned with the assessment of damages as judgment was entered in favour of the Claimant on January 31, 2012.

BACKGROUND

[3] The Defendant is a statutory body corporate established under the provisions of sections 3(1) and 7(1) of the Belize Tourism Board Act, Chapter 275.

[4] The Claimant holds a Masters degree in business administration. In August 2003, he was appointed to the position of Registrar of Hotels and Tourist Accommodation, a post created by section 3 of the Hotels and Tourist Accommodation Act, Chapter 285. After holding this post for seven (7) years, the Defendant appointed the Claimant to the post of Director of Destination Planning in September, 2010. The latter appointment was made for an indefinite period upon the same terms and conditions as his previous appointment.

[5] By a letter dated March 1, 2011, the defendant terminated the Claimant's employment with immediate effect and purported to tender payment in lieu of notice. At the time of termination, the Claimant was earning a total benefit package of \$78,800.00, a telephone allowance of \$3,600.00 and a fuel allowance of \$2,400.00. He also enjoyed paid vacation leave of 20 days per annum in addition to an annual inflationary increase based on inflation reported by the Central Bank of Belize, an annual increment not exceeding 5% of annual salary based on performance appraisal and an end of year bonus.

[6] Subsequent to the termination, the Claimant obtained employment as Marketing Officer with the University of Belize in Belmopan with effect from July 21, 2011. The appointment was for the one year with the option for renewal on the basis of a successful evaluation. The annual emoluments are \$41,172.00 plus annual vacation leave of 30 days.

THE CLAIM

[7] The claim for damages for wrongful dismissal is governed by the common law. The measure of damages is set out in McGregor on Damages (17th ed.) as follows (at para. 28-002):-

“The measure of damages for wrongful dismissal is prima facie the amount that the claimant would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the claimant, in minimising damages, either had obtained or should reasonably have obtained.”

In his witness statement, the Claimant asked the Court to award him four years' emoluments as damages for loss of his employment. This was calculated as \$315,200.00 based on the benefit package of \$78,800.00 per annum detailed in paragraph 5 above.

[8] Learned Senior Counsel for the Claimant cited a number of authorities in support of the Claim. In the case of **Ricardo Magana v Free Zone Business Association Ltd. and others** – Action No. 19 of 1997, the Plaintiff was engaged as an engineer on a contract of employment for a period of five years but his services were found to be wrongfully terminated about seven months after his engagement. The learned Chief Justice held that the Plaintiff was entitled to three years' salary in respect of his engagement on the basis that it would have probably run for the contractual period of five (5) years had it not been terminated. The three years was arrived at on the basis that the Plaintiff remained unemployed for that period until he secured employment at a higher salary. On behalf of the Defendant, learned Counsel sought to distinguish this case on the basis that it involved a fixed contractual period as against the indefinite engagement of the Claimant in the present case.

[9] Also cited in support of the claim was the case of **Sandra Perez v Commercial Free Zone Management Agency** – 4 BLR 195. Barrow, J. (as he then was) awarded damages of the equivalent to one year's salary, increment and gratuity upon the premature termination of a contract for the services of the Plaintiff for five years. His Lordship was not satisfied with the state of the evidence as to the Plaintiff's mitigation of her loss in seeking alternative employment. He elected to award nominal damages having regard to the fact that the loss had been established but the supporting evidence

as to its extent was lacking. Here again, learned Counsel similarly countered that this case was the subject of a fixed term contract.

[10] Reliance was placed on the case of **Taegar v Belize Tourist Board** - 3 BLR 235 wherein the Plaintiff was wrongfully dismissed from her fixed term contract of two years. The Supreme Court ordered that judgment be entered pursuant to the terms of the contract. Both sides agreed that this case was referable to a fixed term contract and was not applicable to the present case.

[11] Responding to the claim for four years' of the Claimant's benefit package, the Defendant laid emphasis on the fact that the engagement was not for a fixed term. It was pointed out that the contract of employment being of indefinite duration, the period of notice was governed by section 40(1)(d) of the Labour Act, Chapter 297 which prescribed a minimum of four weeks' notice for contracts where the worker has been in employment continuously with the same employer for more than two years. In this regard, there can be no demur that the Claimant, by his own admission, was paid one month's pay in lieu of notice upon his termination; the Defendant has thus complied with the statutory provision.

[12] As to the award of damages, learned Counsel turned up a number of cases where the period of notice in the assessment of damages for wrongful dismissal was adjudicated. In the case of **Waithe v Caribbean International Airways Ltd (1987) 39 WIR 61**, Sir Denys Williams, CJ dealt with the question of what was a reasonable period of notice in respect of an engagement for an indefinite period terminable by either party at any time on notice. The learned Chief Justice put the matter thus and concluded as follows:

“What would have been reasonable notice is a question of fact to be determined in the light of all the circumstances. Of great significance in this case are the character of the plaintiff's employment and the availability of similar employment having regard to the plaintiff's experience, training and qualifications. From what I can see, the opportunities open to him

must be very few and his evidence supports this conclusion. I find that twelve months' notice would have been reasonable in the circumstances."

Similarly in **Rajmangal v BVI Electricity Corporation – BVIHCV 2006/0270** – BVI, Olivetti, J. awarded the Claimant, a mechanical engineer, damages based upon what he would have earned over a period of 12 months' notice.

[13] In **June Clarke v American Life Insurance Company – Civil Appeal No. 33 of 1998**, the Court of Appeal of Barbados awarded damages for wrongful dismissal on the basis of five (5) months' notice in lieu of the one month's employment paid. An award based on 12 months' notice was allowed on appeal by the Court of Appeal of the Eastern Caribbean in the case of **Dominica Agricultural and Industrial Development Bank vs Mavis Williams – Civil Appeal No. 20 of 2003** (Dominica).

ASSESSMENT OF DAMAGES

[14] The measure of damages seeks to put the Claimant as far as is practicable in the financial position he would have enjoyed had his engagement not have been prematurely terminated. The Claimant is however under a duty to take tangible steps to mitigate his loss. Put another way, the Claimant's entitlement is to be compensated for whatever loss would have resulted from the failure of the employer to give reasonable notice. In the case at bar, the Claimant plainly took steps to mitigate his loss but he was only able to secure employment with substantially lower emoluments. The Claimant had been employed for eight years when his engagement was terminated. His age was given as 38 years at the time of his termination. He held a senior management position at a unique statutory body thus rendering comparable employment not readily available. The remit of the Court is to compensate the Claimant for the loss of earnings arising from not having been accorded reasonable notice. In my considered view, based on the circumstances to which I have referred, 12 months would be a reasonable period of notice in this case.

[15] The Claimant has included in his claim as part of the benefit package, allowances for telephone and fuel. However, the answers furnished in cross-examination led to the inevitable conclusion that these allowances were made available

for the performance of the Claimant's duties. He admitted that the telephone allowance would be available when he had to make calls on his phone on behalf of the Board. In addition, he agreed that the fuel allowance was intended to defray the cost of the use of his own vehicle when one of the Defendant's vehicles was not available for use. In the words of Nathan, J. in rejecting allowances for telephone and housing in the case of **Taegar v Belize Tourist Board**, "such allowances being dependent upon service of the contract, she cannot recover those sums for periods she did not serve." The inclusion of the telephone and fuel allowances are therefore to be excluded from the computation as part of the benefit package.

[16] In his witness statement, the Claimant made a claim in paragraph 20 for an annual inflationary increase based on inflation reported by the Central Bank of Belize. No evidence was furnished as to any figures from the Central Bank to support this claim hence this must be disallowed.

[17] Both sides concurred in the computation of severance based on three weeks of basic salary for each of the 8 years of the Claimant's employment amounting to \$35,280.00. However, the Defendant caused an affidavit sworn to by its Director of Finance, Orlando Azueta, on June 8, 2012 subsequent to the hearing. The purpose of the affidavit was adducing of proof of the payment by the Defendant to the Claimant of all outstanding severance payments. The Claimant has not to date challenged the sworn averments of Mr. Azueta and the documents exhibited to the affidavit. In the event, any claim for severance payments must be discounted as having been already satisfied.

[18] The Claim also included amounts for the annual increment based upon performance appraisal being 5% of basic salary, end of year Christmas bonus calculated at 3.5% of basic salary and the employer's contribution of 7% of basic salary towards pension. The latter pension contribution was referable to the 'Top Hat' pension scheme for senior management to which the Claimant was a contributor. The annual increment and end of year bonus are provided for in sections 8 and 11 respectively of the Employees Handbook. These amounts are eligible for inclusion in the calculation of general damages.

[19] Having regard to the award of damages being based on 12 months' notice, the Claimant would be entitled to paid vacation allowance stated to be 20 days of basic salary in the amount of \$4,188.40.

[20] The Claimant has been paid the lump sum of \$14,145.64 one week after his termination and such sum shall be deducted from the gross award. Also to be deducted are the emoluments and vacation benefit accruing from the Claimant's employment at the University of Belize being seven months of annual salary less income tax of 25% amounting to \$18,012.75 and 30 days' salary amounting to \$3,341.00.

[21] On the basis of the foregoing, general damages are awarded as follows:

Basic salary of \$76,440.00 for 12 months	\$76,440.00
Paid vacation leave for 20 days	4,188.40
Annual Increment of 5%	3,822.00
End of Year Christmas Bonus of 3.5%	<u>2,675.40</u>
	\$87,125.80
Less 25% Income Tax	<u>21,781.45</u>
	65,344.35
Add: Contribution to pension at 7%	<u>5,350.80</u>
	\$70,695.15
Less: UB salary and vacation pay (\$18,012.75 + \$3,341.00)	<u>21,353.75</u>
	\$49,341.40
Less: Amount already paid	<u>14,145.64</u>
	\$35,195.76

The Claimant's net entitlement by way of general damages in lieu of reasonable notice amounts to \$35,195.76.

[22] It is ordered that judgment be entered for the Claimant in the sum of \$56,549.51. As the successful litigant, the Claimant is entitled to his costs which shall be prescribed costs as per Appendix B of Part 64 of the Supreme Court (Civil Procedure) Rules, 2005 calculated at 60% having regard to the matter advancing to the stage of assessment of damages. Applying the scale of prescribed costs, the Defendant shall pay to the Claimant costs in the sum of \$5,279.36.

KENNETH A. BENJAMIN
Chief Justice